

BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND
JANUARY 7, 1994

IN THE MATTER OF
Karen L. Milne and
Carl C. Gammon, Owners of
12224 Britannia Circle
Germantown, Maryland 20874
Complainants

v.

Board of Directors
Newton Breese, President
Crawford Farms Townhouse
Association, Inc.
Respondent

Case No. 151-0

DECISION AND ORDER

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1984, as amended, and the Commission having considered the testimony and other evidence of record, it is therefore this 7th day of January, 1994, found, determined and ordered as follows:

On January 27, 1992, Karen L. Milne and Carl C. Gammon, (hereinafter the "Complainants"), owners of a townhouse located at 12224 Britannia Circle, Germantown, Maryland filed a formal dispute with the Office of Common Ownership Communities. The Complainants alleged that the Crawford Farms Townhouse Association, Inc., Board of Directors, governing body for Crawford Farms Townhouse Association, Inc. (hereinafter the "Respondent Board"), did not have authority to require them to remove a side fence and certain plantings which had been constructed and installed by the Complainants. The Complainants further alleged that when the fence was erected in August of 1990 the Association, through its architectural control committee chairperson, Ellen Goodman, approved their request dated August 16, 1990, to erect the side fence. Complainants assert the Respondent Board thereby waived the right to claim that it is in violation of the Declaration of Covenants for the community.

The Respondent Board does not dispute that the architectural control committee, while under developer control, approved the Complainants' application to erect the fence, but contends that the Complainants' side fence was built in violation of Article VII, Section II of the Association's Declaration of Covenants, the provisions of which cannot be waived by the architectural control committee. The Respondent further contends that it never approved any plantings installed by the Complainants on common area owned by the Association and, therefore, all such plantings must be removed immediately.

The Complainants seek an Order allowing it to maintain the fence which has been constructed alongside their property, as shown in Exhibit 1 introduced by the Respondent Board at the hearing which was held in this matter. At the hearing the Complainants acknowledged that the fence and compost pile which they had placed on common area belonged to the Association and Mr. Gammon stated "if you want [them] taken out I'll take [them] out." Accordingly, the Complainants no longer dispute the right of the Association to order them to remove any plantings or other items which they have placed on the common area without the Association's approval or consent.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e). On October 20, 1993, the Commission conducted a public hearing in this case.

FINDINGS OF FACT

Based on the stipulations of the parties and the testimony and evidence of record, the Commission makes the following findings:

1) At the time that the Complaint in this matter was filed, the Complainants were owners of the townhouse unit located at 12224 Britannia Circle, Germantown, Maryland, within the Crawford Farms Townhouse Association, Inc. (hereinafter the "Association"). Said property is now owned entirely by Complainant Carl C. Gammon, as Karen L. Milne has transferred her interest in said property to the Complainant by deed dated February 22, 1993. Accordingly, this matter is now brought by Carl C. Gammon (hereinafter the "Complainant") and Karen L. Milne is no longer a party to this dispute.

2) The Association is a community consisting of sixty-two townhouses located in Germantown, Maryland, and is governed by the Declaration of Covenants, Conditions and Restrictions which were introduced as Exhibit 1h in this case. Pursuant to Article VII, Section XI of the Declaration of Covenants for the Association, the construction of any fence that extends beyond the "rear building line" of any dwelling in the Association is prohibited.

3) On August 8, 1990, the Complainant submitted a request to the Respondent Board's architectural control committee requesting permission to erect a cedar board-on-board privacy fence using the same materials as the existing eight-foot-tall section of fence directly behind their townhouse. Complainant's application was introduced as Exhibit 1g and the diagram illustrating their fence location were introduced as Exhibits 1g and 1f, respectively, in this case.

4) The Complainant's townhouse is located at the end of a seven-unit section of townhouses. The fence which he sought permission to construct was to extend 10 feet from the side of his townhouse to the limit of the side yard and 48 feet to the rear corner of his property. According to the diagram submitted with the application, the corner of Complainant's townhouse is 30 feet from its rear property line and the side yard fence was to extend 48 feet from the rear property corner, thereby extending 18 feet from the side of Complainant's townhouse. This is the portion in dispute in this case. The application form further indicated that all improvements must be on the Complainant's property lines and therefore the measurements shown on Exhibit 1f were merely approximations of the distance from the townhouse to the rear property line. The measurements in the application were not guaranteed by the Complainant, nor was a survey prepared by him to verify that the dimensions shown on his house location survey were accurate.

5) On August 16, 1990, a letter was sent to the Complainant by Property Management People, Inc., the management agent hired by the developer of the Association, indicating that the Board of Directors had approved their application. The approval indicated, among other things, that the Complainant was to contact the office of Property Management People, Inc., when the project was completed so that they could issue a final inspection for the Association. This was never done by the Complainant, although Mr. Edward Thomas, who testified as the property manager for the Association, admitted that the Association was aware that the fence had been constructed as early as March of 1991 and that the Association's inspection revealed that the fence was constructed beyond the rear property line. The Respondent does not contend that the materials used by the applicant were different than those stated on their application.

6) In October of 1990 control of the Association was transferred from the developer, Stanley Martin Corporation, to the Crawford Farms Townhouse Association, Inc. Prior to that time the Board of Directors was controlled by the developer and the architectural approvals, including that issued to the Complainant in this case, had been issued by Ellen Goodman, a member of the Board of Directors while it was under developer control. Ellen Goodman did not appear as a witness at the hearing in this matter, although Mr. Thomas testified that he spoke with her regarding the basis on which she had approved the Complainant's application and she advised him that she was serving grand jury duty at the time and did not review the Declaration of Covenants when she approved the Complainant's application. Mr.

Thomas further testified that Ms. Goodman did not consult with him before issuing the approval.

7) By correspondence dated March 4, 1991, Andrea Johnson, an agent for the Respondent Board, notified the Complainant that his fence was in violation of the covenants and that Property Management People, Inc., as management agent for the Association, was investigating the matter with the builder, Stanley Martin Corporation.

8) By correspondence dated March 20, 1991, Andrea Johnson again notified the Complainant that Stanley Martin Corporation had made an error in approving his fence construction plans in August of 1990 and that Stanley Martin would relocate the fence at its own expense.

9) By correspondence dated March 27, 1991, the Complainant requested that the Respondent Board delay moving his fence until after the April 16, 1991 meeting of the Board of Directors. At that meeting the Board agreed to schedule a special meeting of the members of the Association on April 30, 1991, to consider a change in the covenants to allow side yard fences. Such an amendment would have required the approval of 90 percent or 56 of the 62 homeowners in Crawford Farms. However, at the meeting on April 30 the Complainant was only able to produce 27 votes in favor of the amendment and the Board elected to continue the meeting until May 21 in order to allow the Complainant an opportunity to obtain proxies from additional homeowners in favor of the proposed amendment. At the meeting on May 21, 1991, the amendment again failed to receive the necessary 56 votes with 41 voting in favor, 7 against and 14 abstentions.

10) By correspondence dated June 14, 1991, Edward Thomas, as agent for the Respondent Board, notified the Complainant that because the proposed amendment had failed his violation had to be corrected within 15 days from the date of the letter.

11) By correspondence dated June 26, 1991, the Complainant advised the Respondent Board that he intended to: (a) obtain a survey of his property, (b) obtain written costs estimates for bringing his fence into compliance, and (c) pursue amending the covenants.

12) By correspondence dated November 26, 1991, Mr. Thomas again ordered the Complainant to bring his fence into compliance with the covenants on or before December 14, 1991, and to remove the portions of his side and rear yard fence which encroach upon common area owned by the Association.

13) In December of 1991 the Complainant wrote to Mr. Thomas and stated that he would re-site his fence if Stanley Martin would agree to pay the costs of removing and relocating his fence as well as reimbursement for the materials and supplies used to landscape his side yard.

14) The Respondent Board never agreed to Complainant's request and on January 23, 1992, the instant complaint was filed with the Commission on Common Ownership Communities.

15) At the hearing on this matter the Complainant acknowledged that he had followed a house location survey when he constructed the fence alongside and to the rear of his house and that portions of the fence do encroach upon common areas owned by the Association. Mr. Gammon further acknowledged that he had placed a compost pile and mounds of dirt from a fish pond he had constructed in his rear yard on common areas owned by the Association and acknowledged that he would remove them if requested by the Board. Such a request was made by the Board at the hearing in this matter and, therefore, the Commission finds that the Complainant has withdrawn any dispute he filed relating to the compost pile and mounds of dirt he has placed on common areas owned by the Association, and is bound to remove them within thirty (30) days from the date of this Order, weather permitting.

16) At the hearing on this matter Mr. Gammon also stated that he did not receive a copy of the recorded Declaration of Covenants for the community when he purchased his home on July 27, 1990, and that the Covenants he received did not contain language prohibiting side yard fences. He further stated that he did not receive a copy of the recorded Declaration which contained language prohibiting side yard fences until he attended the Board of Directors meeting on April 16, 1991.

17) The Commission finds that the Declaration was recorded on February 21, 1989, in the Land Records for Montgomery County, and that Mr. Gammon's property is therefore subject to the recorded Declaration regardless of whether or not Mr. Gammon received a copy at settlement.

18) In addition to Mr. Gammon's application, the developer controlled Board for Crawford Farms received requests for two other side yard fences which were denied before control of the Board was transferred from Stanley Martin Corporation to the homeowners. At this time, Mr. Gammon's is the only side yard fence in the development, although a number of rear yard fences have been approved and constructed.

19) Since constructing his side yard fence, Mr. Gammon has installed considerable landscaping inside the fence, including terracing, plantings and a goldfish pond. The testimony was unclear as to the exact dates when the improvements were installed, although it is clear that a significant amount was installed after Mr. Gammon

received notice in March 1991 that his side yard fence was in violation of the Declaration and had been improperly approved.

20) The Stanley Martin Corporation did not appear at the hearing in this matter. Representatives of the Respondent Board indicated that Stanley Martin is no longer willing to pay for the cost of removing and relocating the Complainant's fence, nor is the Respondent Board willing to pay the costs for this work.

21) The Complainant refuses to relocate his fence and would not voluntarily do so even if the Respondent Board was willing to pay for the cost of removing and relocating his fence and the landscaping he has installed behind it.

CONCLUSIONS OF LAW

Accordingly, the Commission concludes based upon a preponderance of the evidence including, but not limited to, testimony and documents admitted into evidence, and after a full and fair consideration of the evidence of record, that:

1) In August of 1990, the Complainant followed the established procedure adopted by the Respondent Board for submitting a request to construct a fence on his property. This procedure included filing an application which was submitted by the Complainant on August 8, 1990, which was approved by the developer controlled architectural control committee for the Respondent Board on August 16, 1990.

2) In his application the Complainant agreed to construct a fence along his property line and the Respondent Board's approval of this request did not waive that requirement. Accordingly, the Complainant is required to obtain an accurate survey and place his fence inside his property lines.

3) The Respondent Board waived its right to order the Complainant to remove that portion of his fence which is along the side of his home by approving his application on August 16, 1990. Accordingly, the Respondent Board is estopped from enforcing the provisions of Article VII, Section XI of the Declaration against the Complainant. In reaching this decision the Commission has researched the case law pertaining to waiver and estoppel in the State of Maryland and has also reviewed the case law cited by the Respondent Board. The Commission finds persuasive the case entitled Speer v. Turner, 33 Md.App. 716, 366 A.2d 93 (1976), in which the Court of Special Appeals of Maryland held that a homeowner who had previously agreed to the construction of a structure on his neighbor's property and had acquiesced in the building's construction for a period of several weeks, had waived any right to complain that the structure violated a restrictive covenant. In that case, the Court defined the doctrines of waiver and estoppel as follows:

"Waiver is closely inter-related and intertwined with estoppel. The distinction between the most frequently adverted to is that waiver rests upon the intention of the party, while estoppel rests upon a detrimental change of position induced by the acts or conduct of the party estopped."

. . .

"In civil cases, waiver has been held to mean 'the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances'." Id. at 728 (citations omitted)

In the instant case, the Complainant relied upon the Respondent Board's approval of his application to construct a side yard fence when he constructed the fence. Applying the principals set forth above, the Commission therefore finds that the Respondent Board, having given its permission to construct this fence, is estopped from complaining that the fence violates the covenants for the Association.

4) The Commission's opinion in this matter does not mean that the Board has automatically waived its right to enforce Article VII, Section II against any other member of the Association. In that regard, the Commission finds the case of Kirkley v. Seipelt, 212 Md. 127, 128 A.2d 430 (1957) quite instructive. In Kirkley, the Court of Appeals of Maryland upheld an order of the Circuit Court for Baltimore County which enjoined the appellant homeowner from erecting permanent metal awnings in front of his home in violation of a restrictive covenant. In reaching its decision, the Court found that the homeowners who sought the order enjoining construction of Appellant's awnings had not waived the restriction merely because metal awnings, similar to the ones anticipated to be installed by the appellant, had been erected on the fronts of two other homes in the fifteen hundred home subdivision. The Court noted that the existence of metal awnings on the front of two homes in a fifteen hundred home subdivision does not constitute an abandonment or waiver of the restrictive covenant. Similarly, in the instant case the existence of one side yard fence may not, in and of itself, constitute a waiver of the restrictions set forth in Article VII, Section XI against any other homeowner in the Association. Whether such a waiver has occurred would depend upon facts and circumstances which are not currently before the Commission. In this case, the Commission has only been asked to determine whether the Complainant's side yard fence may remain, and in reaching its decision the Commission does not make any finding as to whether the Respondent Board has waived the restrictions set forth in Article VII, Section XI as they may apply to any other homeowner in the community.

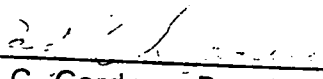
ORDER

In view of the foregoing, and based on the evidence of record, the Commission orders that:

- 1) The Respondent Board may not require that the Complainant remove that portion of his side yard fence which is located in front of the rear building line of his dwelling because it approved this as part of Complainant's building application.
- 2) That the Complainant must obtain an accurate survey and relocate his rear and side yard fence within his property lines.
- 3) That the Complainant must remove the mound of dirt and compost pile which he has placed on common ground owned by the Respondent Board within thirty (30) days, weather permitting.

The foregoing was concurred in by panel members Gordon and Szajna.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



David C. Gardner, Panel Chairperson
Commission on Common Ownership Communities